



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 22, 2010

Ms. Cheryl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, Suite 300
Fort Worth, Texas 76102

OR2010-14377

Dear Ms. Byles:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 394295 (Fort Worth PIR# W002060).

The City of Fort Worth (the "city") received a request for fourteen categories of information related to the city's water department and a specified personnel investigation. You state the city has released some of the requested information. You state information responsive to one category of the request does not exist.¹ You claim that the remaining information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You inform us a portion of the submitted information, which you have marked, was the subject of a previous request for information received by the city, a result of which this office issued Open Records Letter No. 2009-18459 (2009). In that ruling, we held the city must release the information at issue. We have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based. We, therefore, conclude that the city must continue to rely on Open Records Letter No. 2009-18459 as a previous determination and release the previously ruled upon information. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that

¹We note the Act does not require a governmental body to release information that did not exist at the time the request for information was received or create new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W. 2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

information is or is not excepted from disclosure). With respect to the remaining information, which was not previously ruled upon in Open Records Letter No. 2009-18459, we will consider your arguments against disclosure.

We note a portion of the remaining information is subject to 552.022(a) of the Government Code, which provides in part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(18). The submitted information includes a signed settlement agreement to which the city is a party. This settlement agreement is subject to section 552.022(a)(18) of the Government Code. Although you seek to withhold the settlement agreement under section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. ~~See id. § 552.007; Dallas Area Rapid Transit v. Dallas Morning News~~, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (section 552.103 may be waived); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Consequently, the city may not withhold the submitted settlement agreement under section 552.103 of the Government Code. As no other exceptions to disclosure have been claimed for this information, the submitted settlement agreement must be released.

Section 552.103 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. See Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. See Open Records Decision No. 361 (1983).

You inform us, and have provided documentation showing, that prior to the city's receipt of the present request, the city received a demand letter from the requestor, who is an attorney representing a city employee. In the demand letter, the requestor alleges the city has discriminated against her client based on gender. The letter demands that the city restore her client's former job title and duties and pay her client compensatory damages. Further, the letter states that if the city fails to take this action, the requestor's client will file suit. You also inform us that after the city refused the requestor's demands, the requestor filed a formal administrative complaint with the city's Department of Human Resources, which you state begins the process of satisfying the pre-conditions to file a lawsuit. Upon review, we agree that the city reasonably anticipated litigation when it received the present request. We further conclude that the information at issue is related to the anticipated litigation for the purposes of section 552.103(a). Therefore, the city may generally withhold the remaining information under section 552.103 of the Government Code.²

The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. See ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. See Open

²As our ruling is dispositive for this information, we need not address your remaining arguments against disclosure.

Records Decision Nos. 349 (1982), 320 (1982). We note the remaining information includes e-mails sent and received by the requestor's client, a memorandum that was sent to the requestor's client, and a letter to the city from the requestor. Accordingly, the city may not withhold this information, which we have marked, under section 552.103 of the Government Code. As you raise no further exception to the disclosure of these documents, they must be released. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the city must continue to rely on Open Records Letter No. 2009-18459 and release the information previously ruled upon by this office. The city must release the settlement agreement subject to section 552.022(a)(18) and the marked e-mails, memorandum, and letter. The city may withhold the remaining information under section 552.103 of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 394295

Enc. Submitted documents

c: Requestor
(w/o enclosures)